Chapter 600 - Employment

Subchapter 01 - Employment

60001.601 Employee Defined

Whether an individual is an "employee" under the common law rules or Federal statutory definition is determined in accordance with the provisions of the Social Security Act and the applicable regulations. Under the Social Security Act, the term "employee" includes:

- An officer of a State or political subdivision. (Section 218(b)(3))
- Any individual who, under the common law rules applicable in determining an employer-employee relationship, has the status of an employee. (Section 210(j)(2))

For purposes of coverage under Section 218 Agreements and the mandatory coverage provisions, the individual performing services must be an employee of the State or local government entity.

State law provisions are used to determine whether an individual is an officer of a State or political subdivision and, therefore, an employee. Review the State statutes to determine whether they establish enough control for the individual to be classified as an employee. Statutes may state that a specific position is that of a public official, in which case there is likely to be a right to control sufficient to make the individual an employee. (A notary public and a juror perform the functions of a public office but are not public officers.)

60001.605 Common-Law Rules

An individual who performs services for a State or local government is an employee if the individual is an employee under the common law rules. The common law rule for determining whether a worker is an employee is whether the government entity has the right to direct and control the worker as to the manner and means of the worker's job performance. In other words, the entity has the right to tell the worker not only what shall be done but how it shall be done.

If an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, the individual is an independent contractor. The difference between an employee and an independent contractor lies in the degree of control.

60001.610 Employee vs. Independent Contractor

In determining whether an individual is an employee or an independent contractor under the common law rule, all evidence of control and independence must be considered. The facts fall into three main categories:

- does the entity have the right to direct and control how the worker performs the specific task for which the worker is hired;
- does the entity have the right to direct and control the business and financial aspects of the worker's activities; and
- the relationship of the parties. A written contract is a very important piece of evidence showing the type of relationship the parties intended to create. A written agreement describing the worker as an independent contractor is evidence of the parties' intent. The substance of the relationship, not the label, governs

the worker's status. The facts and circumstances under which a worker performs services are determinative. The substance of the relationship, not the label, governs the worker's status

If a State has a question concerning whether an individual is an employee, the State should direct its inquiry either to SSA or to IRS, which has authority to determine whether an individual is an employee for FICA tax purposes.

60001.615 Section 530 of the 1978 Revenue Act

Section 530 of the Revenue Act of 1978 provides, under certain circumstances, employers relief from Federal employment tax obligations when IRS determines the employer misclassified employees as independent contractors.

The Section 530 provision does not apply to State and local government employers covered under Section 218 Agreements. However, State and local government employers whose workers are subject to the mandatory Social Security and Medicare tax provisions are eligible for Section 530 treatment.

Refer to IRS questions concerning the Section 530 provision.

60001.620 Elected Officials

Individuals elected to serve in State or political subdivision positions are generally employees of the entity in which they are elected. In some situations, the elected official's duties for that entity require the elected official to perform certain duties for other entities within the jurisdiction of the entity in which he or she was elected. For coverage purposes, the elected official is the employee of the entity in which he or she was elected with respect to his or her official duties.

60001.625 Fee-Based Public Officials

A fee-based public official is an individual who receives and retains remuneration directly from the public. An individual who receives payment for services from government funds in the form of a wage or salary is not a fee-based public official, even if the compensation is called a fee.

Reference: *Social Security Ruling 92-4p* (SSA adopted the IRS definition of a "fee.")

A. POSITION COMPENSATED SOLELY BY FEES

Services in positions compensated solely by fees are excluded from coverage under Section 218 Agreements (unless the State specifically included these services) and are covered as self-employment and subject to SECA.

B. POSITION COMPENSATED BY SALARY AND FEES

Generally, a position compensated by a salary and fees is considered a fee-basis position if the fees are the principal source of compensation, unless a State law provides that a position for which any salary is paid is not a fee-basis position. A State may exclude positions compensated by both salary and fees from Social Security and Medicare coverage under the State's Section 218 Agreement. If the exclusion is taken, none of the compensation received, including the salary, is covered wages under the Section 218 Agreement. However, the salary payment, while excluded under the Agreement, is subject to mandatory Social Security if the official is not a member of a public retirement system.

60001.630 Justices of the Peace

A justice of the peace is ordinarily a public officer and, therefore, an employee of the political entity for which he or she performs services. A justice of the peace is often an elected official.

Reference: *Social Security Ruling 73-58c*

60001.635 Police Officers and Firefighters

Police officer and firefighter positions are defined under State statutes and court decisions. The terms do not include services in positions that, although connected with police and firefighting functions, are not actually police officer and firefighter positions.

NOTE: Police officers and firefighters are not considered emergency workers under the mandatory exclusion from Social Security and Medicare coverage. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis (e.g., an individual hired to battle a major forest fire or to provide emergency assistance in other similar disasters such as volcano eruption, severe ice storm, earthquake and flood).

60001.640 Public Officers

An officer of a State or political subdivision is an employee by statutory definition. Generally, the statutory authority establishing the position describes the occupant of a position as a public officer if, in fact, that is his/her status. Indicative of such status are provisions that the individual has tenure in his/her position and that he/she takes an oath of office. Generally, a public officer exercises some part of the sovereign power of the State or political subdivision.

A mayor, member of a legislature, county commissioner, State or local judge, justice of the peace, country or city attorney, marshal, sheriff, constable, or a registrar of deeds is a public official. Other examples are tax collectors, tax assessors, road commissioners, members of boards and commissions, such as school boards, utility districts, zoning boards, and boards of health.

A notary public and a juror perform the functions of a public office but are not public officers and are not employees.

Reference: Social Security Ruling 72-36

60001.642 Court Reporters

According to the U.S. Department of Labor / Bureau of Labor Statistics, approximately 60% of court reporters work for State and local governments, 10% are self employed, while most of the remaining court reporters are salaried employees working for court reporting agencies or firms. The National Court Reporters Association (NCRA), along with other leading industry participants, classifies court reporters as two different types, “official” and “independent or freelance.” Official court reporters are employed by judges and the courts. Independent court reporters are commonly self employed or work for an independent reporting firm.

The distinction between official and independent court reporters is not always obvious. For example, the court reporter in a state court might be referred to as "official," even though he/she is actually an independent reporter. This incorrect association is often a result of a lack of understanding regarding the types of court reporters. Also, the term "official" has become synonymous with any duty performed in a court of law rather than exclusively a title for full time government employed court reporters. Furthermore, due to an increasing number of firms representing court reporters, it is becoming more common to have courts contract with independent reporters to serve on an "as needed" basis. The independent court reporter is not an employee of the court, but provides court reporting services to the court. Similarly, a reporter who works as an official court reporter in a government court can also act independently. All work done outside of the court not related to their official government position is considered independent employment. Independent employment is not subject to the provisions of respective 218 agreements in which coverage is extended to official court reporters in any given state or instrumentality.

Official government court reporters in public courts are government employees with respect to services performed by them which are required by statute. The same holds true for local or county court reporters working in municipal courts. Those services performed by official government court reporters outside of the statute, such as furnishing additional transcripts, in which a fee is paid directly to the court reporter (see SL 60001.625 for public officials paid by fees) will be remunerated by wages, or payments which become self employment income, separate from their wage payments by the government entity or court. Self employed independent court reporters working outside of a court or those who contract their services to a government court are compensated with payments which become self employment income. Court reporters represented by court reporting agencies are employees of the agency not the state or instrumentality for which they perform services. Official court reporters can perform independent work; however, independent or freelance court reporters, while they may be assuming the role of an official court reporter, are not government employees.

In all instances, SSA and State Social Security administrators should first consult their respective section 218 agreements for mention of the service of court reporters. Any individual who is not an officer of the State or instrumentality of government as defined in Section 218(b)(3) should be evaluated on the basis of whether or not an employer / employee relationship exists. Refer to RS 02100.000 for additional information on employee /employer relationships.

60001.645 Sheltered Workshops

A. WHAT A SHELTERED WORKSHOP IS

A State or non-profit organization established to carry out a program of rehabilitation for handicapped individuals, and/or to provide these individuals with remunerative employment or other occupational rehabilitating activity.

B. HOW A SHELTERED WORKSHOP OPERATES

The State or non-profit organization may contract with private business to operate the workshop, but usually provides individual supervision for the handicapped worker. A program of rehabilitation is established for each individual, and typically consists of (1) a diagnostic and evaluation period; (2) a personal adjustment training period; and (3) a vocational training period. During this rehabilitation training, the individuals are usually paid at reduced pay rates. While the individual is completing this regimen, the services of these individuals are generally not performed as an employee and the remuneration is not wages for employment.

After completing the rehabilitation program, the individual leaves the workshop environment and enters regular employment, if able to perform an available job. Individuals who are unable to obtain regular employment because of the severity of their impairments or unavailability of jobs, are retained in the workshop indefinitely or until placed in regular employment. The individuals performing services are paid at a fraction of or up to minimum wage, depending on their capacity to perform the services. The services of these individuals generally are performed as employees.

Reference: *Social Security Ruling 69-60*

60001.650 Tax Assessors and Tax Collectors

If under State law these positions are public officers, these individuals are employees. Generally, elected tax collectors and elected tax assessors are employees of the political subdivisions in which they are elected. The services performed by tax assessors or tax collectors who are elected to a position, and, in addition, are appointed under a separate legal authority to assess or collect taxes for other political subdivisions, are treated separately for coverage purposes. Tax assessors and tax collectors who perform employment services in nonelective positions may be employed by more than one political entity. In questionable cases, apply the common law rule, i.e., the right to control when the tax assessor or tax collector performs services, where and how he or she performs services.

60001.655 Volunteer Firefighters

When a firefighter receives compensation, that compensation is wages and is subject to FICA taxes, unless an exclusion applies. It does not matter whether the workers are called "volunteers." Any worker who receives compensation for services performed subject to the will and control of an employer is a common-law employee. If the worker is a common law employee, the amounts paid, whether in cash or some other form, are subject to withholding. Volunteer firefighters are generally considered employees of the fire departments or fire districts for which they perform their services.

Firefighters who are on call and work regularly but intermittently do not qualify for the emergency exclusion under Section 218(c) (6) of the Act, even if their work involves situations that may be considered emergencies. This exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis (e.g., an individual hired to battle a major forest fire or to provide emergency assistance in other similar disasters such as volcano eruption, severe ice storm, earthquake and flood).

While volunteer firefighters may not receive wages, they may receive remuneration intended to reimburse them for expenses. Expense reimbursements (whether cash, in-kind benefits, or tax exemptions) paid to firefighters must be made under an accountable plan. According to Internal Revenue Code section 62(c), an accountable plan must:

- require firefighters to substantiate actual business expenses,
- allow no reimbursements for unsubstantiated expenses, and
- require that any amounts received that exceed substantiated expenses be returned with a reasonable period.

Any amounts paid for reimbursement that do not meet these conditions are considered made under a non-accountable plan and are treated as wages. Therefore, a per diem amount that does not reimburse actual,

documented expenses is subject to Social Security and Medicare. It does not matter whether the amount is paid as reimbursements, a per diem, or under a point system.

60001.660 Identity of the Employer

The common-law rules apply in determining the identity of an employer for purposes of determining whether services for that employer are covered. The employer is the entity that has the final authority to direct and control the individual in the performance of his or her work, or which reserves the right to do so. This includes the power to hire, fire, supervise and control the individual. The source of the payment for employment is not a controlling factor in deciding the identity of the employer.

Situations may arise where the employee works for more than one entity, e.g., a tax collector who collects for two or more political subdivisions, and the identity of the employer is not clear.

If there is a provision in a statute or ordinance, expressed or implied, which authorizes employment of the individual, and he or she is hired (or elected) under this authority, the individual is an employee of the State or political subdivision to which the provision applies. If there is no such authority, the employer is the entity that has the right to control the worker in the performance of the work, i.e., the common-law employer.

60001.665 Cooperative Federal-State Government Employment

If an individual performs services in connection with an activity carried on cooperatively by the Federal Government and any State or local government entity, it must be determined whether the individual is an employee of the Federal government or of the State or political subdivision. Beginning November 10, 1988, under section 205(p) (1) of the Social Security Act, SSA determines whether the individual is an employee of the Federal government or of the State or political subdivision. Before November 10, 1988, SSA accepted a determination by the heads of other Federal agencies as to whether such individuals were Federal employees. Such determinations are for Social Security coverage purposes and not for purposes of taxation.

If it is determined the individual is not an employee of the Federal government, it must be determined whether the individual's services are covered under the State's Section 218 Agreement or under the mandatory Social Security coverage provisions. If there is a question concerning the identity of employer, the issue and all pertinent information should be submitted to the Social Security Administration.

60001.670 Cooperative State-Local Government Employment

An individual may perform services for an organization in connection with an activity carried on cooperatively by the State and one or more political subdivisions or by two or more political subdivisions.

- If the organization is a separate political subdivision, the coverage of the employee is dependent upon whether the employees of the political subdivision are covered under a Section 218 Agreement or the mandatory Social Security and Medicare coverage provisions.
- If the organization is not a separate political subdivision, it must be determined which political subdivision is the employer of the individuals performing services, i.e., which entity actually hires, fires, and controls the performance of services. If one entity is the employer, the coverage of the employees is dependent upon whether the employees of the political subdivision are covered under a Section 218 Agreement or the mandatory Social Security and Medicare coverage provisions.

- If the organization is not a separate political subdivision, it may be an entity created by a joint venture of two or more political subdivisions in which none of those political subdivisions has been designated as the employer. Generally, in such situations, all the participating political subdivisions are considered joint employers. The coverage of services performed by an employee under the State's Section 218 Agreement is then dependent upon the extent to which each of the joint employers has provided coverage for its employees under the Agreement. Each employer which has covered its positions under a Section 218 Agreement is liable for reporting its pro rata share of the employee's wages. Each employer must report up to the taxable maximum.

60001.675 Intergovernmental Personnel Act of 1970

Effective January 5, 1971, the Intergovernmental Personnel Act (IPA) of 1970, Public Law 91-648, permits the temporary assignment of personnel back and forth between Federal agencies, State and local governments, Indian tribes or tribal organizations, institutions of higher education and other eligible organizations. Assignments are for specific work beneficial to both the State, local government, Indian tribe, or other eligible organizations and the Federal agency concerned. An assignment agreement may not exceed 2 years but can be extended for 2 additional years without loss of employee rights and benefits.

An employee assigned under the IPA continues the retirement coverage he or she had prior to the intergovernmental transfer. State and local government employees covered under a Section 218 Agreement immediately before the detail or appointment to the Federal government position continue to be covered under that agreement.

A State or local government employee appointed to a position in a Federal agency is carried by the State or local government on leave without pay status and is paid by the Federal agency. The employee is not covered for Social Security by virtue of the Federal service, however, and wages paid are not reported by the Federal agency. If a State or local government employee is appointed to a Federal agency and there is a problem in reporting the wages paid, the State or local government should contact the Federal agency and the employee to make arrangements to ensure correct reporting procedures are implemented. If the State or local government is given sufficient wage information and is reimbursed the total Social Security taxes due, then the State or local government can include those wages paid in its reports, if the employee's services for the State or local government were covered under a Section 218 Agreement or the mandatory Social Security coverage provisions.

A Federal employee detailed or appointed to a State position is not covered under the State’s Section 218 Agreement even though the employee serves in a position covered by the agreement. The employee continues the Federal coverage he or she had immediately prior to the transfer, i.e., Federal retirement system or Social Security coverage as a Federal employee.